

STATE OF MICHIGAN  
COURT OF APPEALS

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KATHRYN DAMA,

Plaintiff-Appellant,

V

DOUGLAS P. DIETZEL, D.O.,

Defendant-Appellee.

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UNPUBLISHED

April 7, 2005

No. 260110

Ingham Circuit Court

LC No. 01-094772-NH

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this medical malpractice case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed suit alleging that defendant, a board-certified orthopedic surgeon, committed medical malpractice and acted in a grossly negligent manner when, while performing a surgical graft procedure to repair the ulnar collateral ligament in her left elbow, he incorrectly identified the median nerve in her left wrist as the palmaris longus tendon and transected the nerve, causing permanent loss of function in her left hand and arm. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that he was entitled to governmental immunity because reasonable minds could not disagree that he did not act in a grossly negligent manner. The trial granted the motion, finding that reasonable minds could not disagree that defendant's conduct constituted more than ordinary negligence.

We review a trial court's decision on a motion for summary disposition de novo. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Gross negligence is

defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c).<sup>1</sup> To be the proximate cause of an injury, the gross negligence must be “the one most immediate, efficient, and direct cause” preceding the injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Generally, the determination whether a governmental employee’s conduct constituted gross negligence is a question of fact, but if reasonable minds could not differ, the trial court may decide the issue as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 83; 687 NW2d 333 (2004).

Plaintiff argues that the trial court erred by granting defendant’s motion for summary disposition. We disagree. To establish gross negligence, a plaintiff must focus on the actions of the defendant, not on the result of those actions. *Maiden v Rozwood*, 461 Mich 109, 127; 597 NW2d 817 (1999). The essence of plaintiff’s claim is that by mistaking the median nerve for the palmaris longus tendon and cutting the median nerve, defendant acted in a grossly negligent manner as that term is defined by statute. MCL 691.1407(2)(c). Defendant advised plaintiff and her parents that the damage to plaintiff’s elbow might require a graft procedure, but that he could not determine whether such a procedure was needed until he examined the area arthroscopically.<sup>2</sup> Defendant had plaintiff perform a pre-surgical test in order to determine whether the palmaris longus tendon was present in her wrist. Defendant testified that while plaintiff’s gymnastics activity could make identification of the tendon more difficult due to the changes such activity would affect in the wrist, he believed he identified the tendon in plaintiff’s wrist. While performing surgery, defendant determined that a graft procedure would be required, a conclusion with which plaintiff does not disagree, and harvested what he and the assisting physicians believed was plaintiff’s palmaris longus tendon. Defendant harvested the median nerve rather than the palmaris longus tendon, which later was found to be non-existent in plaintiff’s wrist.

The trial court properly granted summary disposition on this record. The evidence showed that defendant attempted to isolate the palmaris longus tendon in plaintiff’s wrist and thought he had done so, but was mistaken. In order to show a question of fact as to whether defendant acted in a grossly negligent manner, the plaintiff was required to present evidence that defendant simply did not care about plaintiff’s health and safety. *Tarlea, supra* at 90. No evidence supports such a finding in this case. Moreover, evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden, supra* at 122-123. The trial court correctly determined that reasonable minds could not disagree that defendant’s actions did not constitute gross negligence, and properly decided the issue as one of law. *Tarlea, supra* at 83.

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<sup>1</sup> 2000 PA 318 amended MCL 691.1407 to preclude a governmental employee from asserting the defense of governmental immunity with respect to medical care provided to a patient. The amended statute applies to causes of action arising on or after October 24, 2000, the effective date of the amendment, and thus is inapplicable to this case.

<sup>2</sup> Plaintiff emphasizes that defendant had never performed this specific graft procedure; however, she cites no authority that holds that a physician acts in a grossly negligent manner by performing a procedure for the first time.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder